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August 21, 2025

LABOR & WORKFORCE DEVELOPMENT AGENCY
Attn. PAGA Administrator
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Oakland, CA 94612
Via Electronic Submission: https://dir.tfaforms.net/308

LAD-N, LLC
635 W. Washington Blvd.
Los Angeles, CA 90015
Via Certified Mailing # 9589 0710 5270 1148 9688 84

Re: Elmer Hester v. LAD-N, LLC
California Labor Code § 2699 Penalties

Gentlepersons:

This office represents Elmer Hester ("Plaintiff") and a proposed group of current and former employees working for LAD-N, LLC ("Defendant") in the State of California. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698, *et. seq.* We herein set forth the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to Plaintiff and all of Defendant's aggrieved employees.

Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of a group of aggrieved employees defined as: All non-exempt employees who worked one or more shifts for LAD-N, LLC, in the State of California since one (1) year prior to the date of this letter and continuing to the present. ("aggrieved employees").

Defendant has violated Labor Code §§ 510, 1194, 1194.2 and 1199. These statutes require an employer to compensate its employees at the minimum wage rate for all hours worked and at a rate of no less than one and one-half times the regular rate of pay for any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.

Here, Defendant has had a consistent policy of failing to pay wages and/or overtime to Plaintiff and the aggrieved employees. Plaintiff and the aggrieved employees were not properly compensated for all hours worked over eight (8) hours in one day or forty (40) hours in one week. Plaintiff and the aggrieved employees were not properly compensated for all hours worked, because Defendant failed to pay Plaintiff and the aggrieved employees for each and every hour worked. Plaintiff and the aggrieved employees routinely worked "off the clock" and performed compensable activities before, during, and after each working shift for which no pay was provided as detailed below.

Before their shifts, Plaintiff and the aggrieved employees were required to perform compensable activities for around one and a half hours (1 ½) every day, and up to 5 and a half hours (5 ½) hours on Wednesdays. This required "off the clock" pre-shift work is performed daily and Plaintiff and the aggrieved employees are not compensated for the work performed. During their shifts, Plaintiff and the aggrieved employees were required to perform compensable activities during their lunch breaks, for which no pay was provided. After their shifts, Plaintiff and the aggrieved employees were required to perform compensable activities for up to six (6) hours. This time spent working was after being "clocked out" and as such, Plaintiff and the aggrieved employees were not compensated for this time even though this time is compensable.

Defendant issued flag time pay to Plaintiff and the aggrieved employees. However, Defendant failed to include or record any such flag time pay in Plaintiff and the aggrieved employees' regular rate of pay. Defendant failed to include Plaintiff and the aggrieved employees' flag time pay when calculating their regular rate for the purposes of determining overtime pay in pay periods where they were paid flag time pay and also paid overtime. Defendant's failure to record and properly blend any and all flag time pay into the regular rate of pay resulted in the unlawful withholding of wages and/or overtime. As such, Plaintiff and the aggrieved employees were paid at a regular rate less than the rate required under California law.

Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees are entitled to a first meal period of at least thirty (30) minutes for shifts over five (5) hours, to be provided within the first five (5) hours of the shift, and a second meal period of at least thirty (30) minutes for shifts over ten (10) hours. If an employee is entitled to a second meal period, it must be provided after no more than ten (10) hours of work. Defendant failed to maintain a policy informing Plaintiff and the aggrieved employees of these rights. Likewise, the Wage Orders (7-2001) state that: An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes, except that if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. Pursuant to Labor Code § 226.7(c), if an employer fails to provide an employee with a lawful meal period, the employer must pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty (30) minute uninterrupted meal period was not provided, was not provided in full, or was not provided in a timely manner.

Here, Defendant failed to apprise Plaintiff and the aggrieved employees of their rights associated with meal periods and failed to provide timely meal periods. Plaintiff and the aggrieved employees consistently worked shifts over five (5) hours. Defendant failed to provide Plaintiff and the aggrieved employees with proper meal periods of not less than thirty (30) minutes as required by the Labor Code during the relevant time period. Plaintiff's and the aggrieved employees' meal periods were often interrupted, and they were required to perform compensable activities during his lunch break. Plaintiff and the aggrieved employees consistently worked shifts over ten (10) hours. Defendant failed to provide Plaintiff and the aggrieved employees with timely meal periods of not less than thirty (30) minutes within the first ten (10) hours for shifts over ten (10) hours work as required by the Labor Code during the relevant time period.

On July 15, 2021, in *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula for calculating the one extra hour of premium pay that employees are owed if an Employer fails to provide a compliant meal period or rest break. Specifically, the Court held that those premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate. Here, Defendants have had a consistent policy of failing to pay meal period premiums to Plaintiff and the aggrieved employees in compliance with California law.

Pursuant to Labor Code § 226.7 and Wage Order 7-2001, Defendant failed to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes per four (4) hour work period, or major fraction thereof Additionally, on a regular and consistent basis, Defendant failed to provide Plaintiff and the aggrieved employees with a second rest period despite regularly requiring Plaintiff and the aggrieved employees to work over six (6) hours. Additionally, on a regular and consistent basis, Defendant failed to provide Plaintiff and the aggrieved employees with a third rest period despite regularly requiring Plaintiff and the aggrieved employees to work over ten (10) hours.

Plaintiff and the aggrieved employees consistently worked shifts with no rest breaks, and Defendant failed to maintain an accurate policy advising Plaintiff and the aggrieved employees of these rest breaks and failed to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes as required by the Labor Code during the relevant time period.

As discussed above, *Ferra* requires the rest period premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate. Defendant has had a consistent policy of failing to pay rest premiums in violation of Labor Code § 226.7.

As Such, Defendant failed to provide Plaintiff and the aggrieved employees with compliant rest periods. Further, Plaintiff and the aggrieved employees were not compensated with one (1) hour of wages for each missed rest period as required by Labor Code § 226.7.

As a result of the claims alleged above, Defendant engaged in a practice of failing to provide accurate itemized wage statements in violation of Labor Code § 226(a) which requires that every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate by the employee.

Labor Code §226(a)(2) requires that every employer shall semimonthly or at the time of each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing the total hours worked by the employee. Plaintiff and the aggrieved employees are issued wage statements that do not include the total hours worked by the employee. As such, Plaintiff is an aggrieved employee within the meaning PAGA and Defendants has violated Labor Code §226(a) with respect to Plaintiff and all aggrieved employees.

Also, Defendant issued to Plaintiff and the aggrieved employees itemized wage statements that did not include all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee, in violation of Labor Code § 226(a)(9). The itemized wage statements provided to Plaintiff and the aggrieved employees did not include the hours worked at each hourly rate.

Labor Code § 203 provides that if "an employer willfully fails to pay…any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." Here, Plaintiff and all aggrieved employees were not paid all wages due upon their separation from Defendant's employ. As such, Plaintiff is an aggrieved employee and Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code §203.

Further, under Labor Code § 2699.3(c)(2)(A), Defendant may cure the alleged violations within thirty-three (33) calendar days of the postmark date of this notice and within that period, give notice by certified mail if the alleged violation is cured, including a description of actions taken.

We are constrained to move forward with the filing of this complaint alleging causes of action pursuant to Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 512, 1194, 1194.2, 1199 with or without the PAGA claim. Thus, any action by the LWDA would not resolve the entirety of the case, and the interest of judicial economy will be served by allowing the case to proceed as a cohesive whole.

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Very truly yours,

KINGSLEY SZAMET EMPLOYMENT LAWYERS

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[EBK/tg]

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